

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DARRYL DUCKETT,

Defendant-Appellant.

UNPUBLISHED

March 23, 2010

No. 283792

Wayne Circuit Court

LC No. 07-011473-FH

Before: Hoekstra, P.J., and Stephens and M. J. Kelly, JJ.

STEPHENS, J. (*dissenting*)

I agree with the majority's conclusions regarding defendant's issues relating to his sentencing. However, I dissent because I conclude that defendant's conviction for aggravated assault should be vacated.

As the majority acknowledges, the prosecution did not prevent sufficient evidence to support a conviction for aggravated assault because there was no evidence that the victim suffered a serious or aggravated injury. I disagree with the majority's conclusion that defense counsel invited the error and that he also waived any claim regarding sufficiency of the evidence. Although it is true that a defendant cannot seek relief from an error that he invited, it is equally true that a trial judge is presumed to know the law. *People v Sexton*, 250 Mich App 211, 228; 646 NW2d 875 (2002). Defense counsel was not inviting the trial court to find defendant guilty of aggravated assault. Rather, counsel's statements were rhetorical in nature. In convicting defendant of a crime despite the prosecution failing to meet its burden of proof, the trial court committed error and relief is warranted.

/s/ Cynthia Diane Stephens